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ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,
Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

THOMAS C. RAPONE,
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v.

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[redacted]

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

[redacted]

AMICUS CURIAE BRIEF OF ALLEN F. BREED, ET AL. IN SUPPORT OF RESPONDENTS

[redacted]

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CASELAW PRESS, INC., 1317 F STREET, N.W., WASHINGTON, D.C. 20004

Nos. 90-954, 90-1004

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INTEREST OF AMICI CURIAE

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, Allen F. Breed, Raymond Procunier, Walter Dickey,

James G. Ricketts, Maurice H. Sigler, Gordon Kamka, Kenneth Schoen, Jerry Enomoto, Patrick McManus, David Fogel and Warren Benton hereby file this brief amicus curiae in support of respondents. The written consents of petitioners and of respondents have been filed with the Court.

These amici are senior corrections officials who have served as directors of various state correctional agencies throughout the United States. Several have entered into consent decrees during the course of one or more of their directorships. Individually and in combination, these amici represent many years of experience in administering correctional systems, including systems that have been the subjects of correctional reform litigation. These amici have joined together for the purpose of submitting this brief because of their strong interest in the establishment and maintenance of constitutional conditions in prisons and

jails throughout the United States and because of their belief that the safe and orderly implementation of institutional reform is promoted by the use of effective consent decrees.

Allen F. Breed is the former Director of the California Youth Authority. He also served as the first Director of the National Institute of Corrections within the United States Department of Justice.

Raymond Procunier is the former Director of Corrections in the states of Utah, California, Virginia, and Texas. He currently is the Inspector General of the Nevada Department of Prisons.

Walter Dickey is the former Director of the Wisconsin Department of Corrections. He is now a Professor of Law at the University of Wisconsin School of Law.

Maurice H. Sigler is the former Director of the Nebraska Department of Corrections. He also served as the Chairman of the United

States Parole Commission.

James G. Ricketts is the former Director of the Colorado and Arizona Departments of Corrections and is now a corrections consultant.

Gordon Kamka is the former Secretary of the Maryland Department of Public Safety and Correctional Services and is currently Director, Facilities Review Panel, West Virginia Supreme Court of Appeals.

Kenneth Schoen is the former Commissioner of the Minnesota Department of Corrections and is now a foundation official and corrections consultant.

Jerry Enomoto is the former Director of the California Department of Corrections and is a Commissioner of the Commission on Accreditation, American Correctional Association.

Patrick McManus is a former Director of the Kansas Department of Corrections and is a corrections consultant.

David Fogel is a former Commissioner of the Minnesota Department of Corrections, Director of the Illinois Law Enforcement Commission and Chief Administrator of the Chicago Police Department's Office of Professional Standards. He is now a Professor of Criminal Justice at the University of Illinois.

Warren Benton is the former Director of the Oklahoma and Missouri Corrections Departments.

STATEMENT OF THE CASE

The amici adopt respondents' statement of the case as their own.

SUMMARY OF ARGUMENT

Consent decrees are essential to the orderly resolution of institutional reform litigation affecting prisons and jails. They avoid protracted and distracting litigation and maximize the effect correctional leadership has on the selection and implementation of safe and appropriate remedies. Of critical

importance, consent decrees minimize the risk that the remedies selected will be impractical and dangerous and that unrealistic timetables for compliance will be imposed.

Consent decrees will cease to be a viable option if their provisions, including those that exceed constitutional minima, can be abolished unilaterally by correctional and other governmental officials upon an assertion that a correctional system has met the minimal requirements of the Constitution. The legitimate interests of these officials do not require adoption of such a rule. Indeed, the effect of such a rule will be that time-consuming and destabilizing litigation will be required in all cases.

In addition to maximizing the input of correctional officials and avoiding counterproductive litigation, consent decrees make it possible for correctional administrators to maintain safe and secure conditions within the correctional system

during the remedial process. The cooperation of staff and prisoners is promoted by the knowledge that institutional reforms have been agreed to by correctional leadership; that essential cooperation, however, is dependent upon reasonable assurances that remedies agreed to by correctional leadership will be of a lasting nature.

ARGUMENT

CONSENT DECREES PROVIDE THE MOST EFFECTIVE MEANS BY WHICH CORRECTIONAL OFFICIALS CAN PLAY A MEANINGFUL ROLE IN SHAPING THE OUTCOME OF INSTITUTIONAL REFORM LITIGATION

Some stipulations leading to consent decrees are entered into prior to any finding of liability; others follow a trial establishing that conditions in a correctional system are unconstitutional and are intended to shape the remedial action correctional officials will be required to take to correct these conditions. In both instances, the use of consent decrees offers correctional officials the best means by

which to shape the outcome of litigation and to preserve the limited resources of the correctional system.

Protracted litigation disrupts the operation of a correctional system by taxing the management and line staff of institutions and the central office. Time spent collecting documentation, appearing at depositions, and testifying in court detract from the ability of senior and other staff to discharge their routine, but critically important, administrative functions. Thus, when it appears likely that a trial will result in a finding of unconstitutionality, the interests of a correctional system are best served by settlement.

A principal value of a negotiated settlement under these circumstances is the opportunity it provides for correctional officials to have substantial input into the selection of remedies. The negotiation process offers several critically important

advantages over the uncertainties of litigated outcomes.

First, the negotiation process assures that correctional expertise will influence, to the greatest extent possible, the determination of what is to be remedied and what remedial measures are to be employed. It avoids the possibility that impracticable remedial plans will be developed independently by trial courts or, in some instances, by special masters, without the benefit of the knowledge and experience of those who are best equipped to develop policies and procedures to remedy unconstitutional conditions. The correctional expertise to which trial courts repeatedly have been directed to defer is of critical importance in shaping practical remedies and is more effectively exercised at the bargaining table than in the courtroom.

Second, a negotiated settlement offers correctional officials an opportunity to

affect the establishment of priorities for implementation of complex and interrelated remedial actions and to integrate those actions into an orderly process. The importance of the timing of implementation of complex remedial measures in a correctional system cannot be overstated. Simultaneous action cannot be taken on all fronts, both because of limited resources and because the absence of reasonable priorities will lead to administrative chaos and destabilization of the system. In short, implementation of remedial actions according to a realistic timetable is essential to the safety and security of staff and prisoners, and this objective is promoted by the use of consent decrees.

Third, the negotiation process offers correctional officials an invaluable opportunity to educate other governmental officials who are involved in the litigation process, as well as prisoners' attorneys,

about the complexity of the reform process in correctional systems. Thus, the process encourages cooperation on the part of all involved in a joint effort to bring about reform while maintaining safe and secure institutions.

In summary, it is the consent decree that offers correctional officials the maximum opportunity to influence the remedial process. As a result, negotiated resolution is calculated to assure that the remedial action ultimately approved by the trial court will be feasible, safe, and effective. For this reason, settlement should be encouraged in institutional reform cases as it is in all other types of litigation.

UNLESS CONSENT DECREES ARE ENFORCEABLE, THEY WILL CEASE TO BE AN OPTION AVAILABLE TO CORRECTIONAL OFFICIALS INVOLVED IN INSTITUTIONAL REFORM LITIGATION.

The question before the Court that is of greatest interest to these amici is the enforceability of a consent decree that

contains provisions that, in some respects, may exceed constitutional minima. These amici believe that the Court's ruling in Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986), should control the enforceability of consent decrees in the context of institutional reform litigation, including those decrees that contain provisions that exceed constitutional minima. This conclusion is based on compelling practical considerations implicating the safety of staff and prisoners alike. Unless they can be assured that a consent decree will be enforceable, prisoners' lawyers will insist upon litigated findings and remedies. Presumably, a trial court will address only those conditions that clearly fall below minimal constitutional standards and will impose only those remedies it finds essential to address those conditions; otherwise, appellate review will pare overly expansive remedial action ordered by the trial court.

Thus, through litigation, prisoners' attorneys will gain a measure of certainty that the order they obtain will be permanently enforceable.

This measure of certainty, however, exacts a high price on correctional officials and the systems they administer. The adversarial process creates uncertainty with respect to the nature and extent of remedies that will be ordered. It deprives correctional officials of control over the allocation of limited human and financial resources during the course of the remedial process and threatens to establish timetables for the achievement of compliance that are unrealistic and dangerous.

The advantages of negotiated settlement explain why correctional officials, as well as the governmental officials to whom they answer, sometimes will opt for the provision of services or the maintenance of conditions that may exceed constitutional minima. Having

acknowledged that the total absence of any visiting program is unconstitutional, for example, a jail administrator may find that the provision of contact visiting is both feasible and desirable. As a result, the administrator may be willing to offer a contact visiting program in order to gain important concessions relating to the substance or timing of other remedial action that threatens to interfere with the orderly operation of the institution or to consume inordinate resources. Although the Court has held that the requirement of a contact visiting program in a jail exceeds constitutional minima, Block v. Rutherford, 468 U.S. 576 (1984), governmental officials should be free to make a conscious and binding decision to provide such a program in exchange for a higher degree of population density or other objectives to which they attach greater importance.

This argument does not imply that consent decrees incorporating complex, interrelated remedies should be cast in stone. Throughout the course of the remedial process, changes of direction often will be dictated by unanticipated obstacles and by fuller appreciation of problems that all parties gain through cooperative efforts at implementation. When necessary, modification of the consent decree can be obtained either by mutual agreement or by an order approving one party's request for modification. See, e.g., Duran v. Elrod, 760 F.2d 756, 758 (7th Cir. 1985) (reversing, under the standard set forth in United States v. Swift, 286 U.S. 106 (1932), district court's denial of modification of jail conditions consent decree). While we believe that the standard set forth in Swift remains adequate to balance the interests in finality and adaptation to changing circumstances, we note that the trial court in this case also denied

modification under the standard of New York State Ass'n. for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). The Carey standard, when properly construed as a standard that preserves the essentials of the parties' bargain, can also support the interest in stability that is necessary if consent decrees are to fulfill their essential functions. See, e.g., Ruiz v. Lynaugh, 811 F.2d 856, 862 (5th Cir. 1987) (affirming denial of motion to modify prison overcrowding consent decree under Carey standard).

CONSENT DECREES PERMIT CORRECTIONAL OFFICIALS TO MAINTAIN CONTROL OVER STAFF AND PRISONERS DURING THE COURSE OF THE REMEDIAL PROCESS, AND THUS CONTRIBUTE TO THE SAFETY AND SECURITY OF CORRECTIONAL INSTITUTIONS.

The period during which fundamental changes are being made in the operation of a correctional institution or system is a trying one for correctional officials.

Prisons and jails are dangerous places under the best of circumstances. The unsettling process of fundamental change increases danger to staff and prisoners alike unless correctional administrators both remain in control and are perceived as remaining in control of the system.

Staff often become demoralized when they are identified as part of a system that has been branded unconstitutional. Furthermore, as members of an organization designed largely on a para-military model, they are inclined to resist change perceived as being imposed by "outsiders" contrary to the wishes of the warden and the director of corrections. If the remedies that are implemented are understood to include the choices and judgments made by their correctional leaders, however, staff are more likely to provide the degree of cooperation that is essential if the required remedial objectives are to be achieved in an orderly and safe manner.

The remedial process also produces a period of unrest and tension within the prisoner population. With the public vindication of constitutional rights come unrealistic expectations that all grievances will be redressed and that, somehow, a constitutional prison will be a pleasant place to live. If prisoners correctly perceive that changes are occurring because they were agreed to, and in many instances desired, by correctional and other governmental authorities, they are more likely to understand that the effect of the court's finding of liability is not to turn the institution or system over to the prisoners,

but instead presages a period of gradual and controlled change.[1]

The absence of cooperation by staff and prisoners during the unsettling period that marks the reform of unconstitutional correctional facilities and systems not only is likely to doom the reform effort, but it also increases already heightened tensions to a point of unacceptable danger. The authority of correctional administrators during this period will be promoted, both among staff and among prisoners, by the knowledge that the changes that are occurring were influenced strongly and ultimately agreed to by correctional leadership.

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[1] Although correctional reform litigation accomplishes important and fundamental changes in the operation of a correctional system, it is our consistent experience that the extent of change rarely meets the full expectations of the prisoners. This reality creates operational difficulties that are extremely dangerous in the absence of control by correctional administrators.

Closely related to the perceptions of prisoners and staff is the issue of trust among correctional administrators, correctional staff, and prisoners. Once agreed to, provisions of a consent decree provide the basis for the creation of a new status quo within correctional facilities. Staff are trained and directed in new policies and procedures, and prisoners are offered legitimate expectations that these policies and procedures will be implemented.

A sense of permanency regarding the fundamental elements of the operation of a correctional agency is critical to the maintenance of secure and safe conditions for prisoners and staff. Thus, when correctional officials agree to fundamental changes of policy and procedure, and their agreement is sanctioned by appropriate state or local governmental officials, reasonable assurances that these changes will be of a lasting nature are essential. In the absence

of these assurances, neither staff nor inmates will cooperate during the difficult period of institutional transition.

A consent decree is an expression of the commitment of correctional and governmental leadership, staff, and prisoners to create a new and improved status quo within the world in which prisoners and staff live and work. The possibility that solemn undertakings, including those that extend beyond constitutional minima, may be discarded unilaterally when the correctional agency achieves overall constitutional standards is a dangerous one. Although on one level, the prison community is one that is characterized by widespread mistrust between prisoners and officials, maintenance of order rests essentially on the assumption by prisoners and staff that decisions, once made and announced at the highest level of the correctional agency, will be honored. In short, prison officials who enter into consent decrees,

with the support of the agencies of government to whom those officials report, must keep their word and must be perceived as keeping their word in order to avoid a descent into violent chaos following the conclusion of the remedial process.

CONCLUSION

Ironically, a decision that undercuts the presumed continued effectiveness of all agreements incorporated into a consent decree will bring about more, not less, judicial intrusion into the operation of correctional facilities. A predictable consequence of such a decision is that all aspects of the remedial process will be litigated by prisoners' attorneys, rather than negotiated, in order to guarantee that remedial measures that are adopted are consonant with judicial determinations of constitutional minima and, thus, presumptively of lasting application. As a result, correctional and other governmental officials will have less, rather

than more, control over the critically important remedial phase of institutional reform litigation. The effect of the adoption of petitioners' argument, in the considered opinion of these amici, will be one of disastrous proportions to correctional agencies struggling to bring about constitutional conditions while maintaining the safety and stability of institutions that must continue to operate on a day-to-day basis throughout the remedial process.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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